IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re application of:	Confirmation No.: 5134
Richard R. REISMAN	Art Unit: 2182
Application No.: 09/553,337	Examiner: Peyton, Tammara R.
Filed: April 20, 2000	Atty. Docket: 2222.4310003
For: **Method for Updating Software**	

Reply Brief Under 37 C.F.R. § 41.41

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Commissioner for Patents
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Sir:

Appellant filed a Brief on Appeal to the Board of Patent Appeals and Interferences for the above-captioned application on August 18, 2010, appealing the decision of the Examiner in the Final Office Action mailed January 25, 2010. The Examiner's Answer was mailed November 12, 2010. In reply to the Examiner's Answer, Appellant submits this Reply Brief under 37 C.F.R. § 41.41.

Appellant maintains the position that the combination of RIPscrip, Microsoft, Zellweger, and Kleinerman does not teach or suggest each and every feature of independent claims 114, 133, 153, and 171. In particular, Appellant maintains that the combination of RIPscrip, Microsoft, Zellweger, and Kleinerman does not teach or suggest at least "wherein the third instructions receive via the API a response to the functional request from the online service in the background, thereby permitting the graphical user interface to continue operation" as recited in claims 114, 133, 153, and 171.

In the Examiner's Answer, the Examiner continues to implicitly acknowledge that RIPscrip, Microsoft, and Zellweger do not teach or suggest the above noted feature recited in claims 114, 133, 153, and 171, and instead relies on Kleinerman to cure this deficiency with respect to the other references. In addition, and in response to the arguments presented in Appellant's Brief on Appeal filed August 18, 2010, the Examiner contends that: (1) Appellant's argument that Kleinerman teaches away fails; (2) Appellant did not adequately traverse the Official Notice taken by the Examiner; and (3) the above noted feature recited in claims 114, 133, 153, and 171 is equivalent to a multitasking operating system, which was well known prior to the priority date of the present application. (*See* Examiner's Answer, pp. 15-22.) Appellant respectfully disagrees with each of these contentions and addresses each in turn below.

I. The Examiner Incorrectly Contends That Appellant Argues That Kleinerman Teaches Away From the Feature Recited In Claims 114, 133, 153, and 171

On page 18 of the Examiner's Answer, the Examiner alleges that Appellant argues that Kleinerman teaches away from the feature "wherein the third instructions receive via the API a response to the functional request from the online service in the background, thereby permitting the graphical user interface to continue operation" as recited in claims 114, 133, 153, and 171. However, Appellant makes no such argument either literally or "in effect." In fact, Appellant explicitly stated the following in the Brief on Appeal:

> On page 10 of the final Office Action mailed January 25, 2010, the Examiner contends that Appellant previously argued "that Kleinerman *in effect* teaches away from API [sic] performing 'in the background.'" Appellant respectfully submits that no such argument was made. Rather, Appellant previously argued in the reply dated May 22, 2009 that Kleinerman failed to teach or suggest an API that is configured to receive "a response to [a]

> functional request from [an] online service in the background" as recited in independent claims 114, 133, 153, and 171.

(Brief on Appeal, p. 12.)

Thus, any argument presented by the Examiner that Kleinerman does not teach away from the above noted feature recited in claims 114, 133, 153, and 171 is immaterial. What is relevant is whether Kleinerman teaches or suggests (which it does not) "wherein the third instructions receive via the API a response to the functional request from the online service in the background, thereby permitting the graphical user interface to continue operation" as recited in claims 114, 133, 153, and 171.

II. The Examiner Incorrectly Contends That Appellant Did Not Adequately Traverse the Taking Of Official Notice

To traverse Official Notice, an Applicant must specifically point out the supposed error(s) in the Examiner's action, which would include stating why the noticed fact is not considered to be common knowledge or well-known in the art. MPEP § 2144.03(C). Contrary to the Examiner's assertion on page 20 of the Examiner's Answer, Appellant did just this in the Brief on Appeal. (*See* Brief on Appeal, pp. 13-14.)

In particular, the Examiner alleged the fact, without any documentary evidence, that an API configured to receive "a response to [a] functional request from [an] online service in the background," as recited in claims 114, 133, 153, and 171, was common knowledge in the art. (final Office Action mailed January 25, 2010, p. 11.) In response, on pages 13-14 of the Brief on Appeal, Appellant pointed out that this alleged fact is not "capable of instant and unquestionable demonstration as being well known," as expressly required by section 2144.03(A) of the MPEP to take Official Notice. Rather, this alleged fact relates to "the state of the art" at the time of the earliest effective filing date

of the instant application (which was fifteen years ago when the Internet was still in its infancy) and is "subject to the possibility of rational disagreement among reasonable men." *See In re Eynde*, 480 F.2d at 1370, 178 USPQ at 474.

Accordingly, because Appellant specifically pointed out the supposed error(s) in the Examiner's action, the Official Notice of the alleged fact was properly traversed. MPEP § 2144.03(C).

III. The Examiner Incorrectly Contends That a Multitasking Operating System Teaches the Feature Recited In Claims 114, 133, 153, and 171

The Examiner incorrectly contends that the AmigaOS and Microsoft Windows multitasking operating systems (as referenced in the Examiner's Answer on pages 20-22) teach the feature "wherein the third instructions receive via the API a response to the functional request from the online service in the background, thereby permitting the graphical user interface to continue operation" as recited in claims 114, 133, 153, and 171. However, these operating systems at most disclose placing one task in the background while another task is actively executing. This functionality does not come close to the non-obvious and advantageous feature of claims 114, 133, and 153, and 171 noted above.

For example, unlike the feature recited in claims 114, 133, and 153, and 171, these operating systems cited by the Examiner do not teach or suggest the specifics of receiving a response to a functional request ***from an online service*** in the background, let alone receiving such a response ***via an API*** from an online service in the background. The cited to multitasking operating systems may allow one task to be placed in the background while another task is currently being executed; however, these operating systems do not teach or suggest allowing a user interface to continue operation in

between the time a functional request is sent to an online service and a response to the functional request is received from the online service like the feature recited in claims 114, 133, and 153, and 171. This may provide for a more dynamic application, eliminating the need for start and stop interactions between a client application that uses information from remote sources and an online service. In addition, because the response is received from the online service in the background, any interaction with the online service can be transparent to a user. These features are not taught or suggested by the operating systems cited to by the Examiner.

Thus, like the combination of RIPscrip, Microsoft, Zellweger, and Kleinerman, the AmigaOS and Microsoft Windows operating systems fail to teach or suggest "wherein the third instructions receive via the API a response to the functional request from the online service in the background, thereby permitting the graphical user interface to continue operation" as recited in claims 114, 133, 153, and 171.

In light of the arguments above, as well as those set forth in Appellant's Brief on Appeal filed August 18, 2010. Appellant respectfully submits that the final rejection of claims 114-122, 124-126, 128-141, 143-145, 147-155, 157-161, 163-173, 175-179, and 181-202 is improper and should be reversed.

Respectfully submitted,

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